1947.

File No. G. A. Bel/47

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Examined
9/2/15

Legal DEPARTMENT

A BRANCH

Subject:— Criminal Appeals in the High Court of Bombay against the order of acquittals from Belgaum District.

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Sessions Exh.No.33 "

Sessions Case No.70/1946.

Imperator.

Vs.

1.Gundappa Kallappa Ghatage

2.Laxman Krishna Rendale.of Janawad.

Opinians of the Assessors.

1.Mr.V.M.Uppin.
Q:- What is your opinion?

A:-Both the accused are guilty uhder Sec.304 I.P.C read with Sec.34 R.I.P.C.

Q:- What are your reasons?

A:- There were illfeelings between the deceased and the accused and so they must have designed not to kill but to beat him severely.I belive the eyewitness Rama,Sharma And Paru.I do not belive that Ballappa Rayappa has told the truth.I belive that Ratnappa did make a statement as contained in Ex.11.It may be that accused 1 & 2 first beat and then the other 3 joined them.

2.Mr.J.K.Paranjipe.

Q:- What is your opinion?

A:- I am of the same opinion as Mr.Uppin and for the same reason

3.Mr.R.V.Herekar.

Q:- What is your opinion?

A:- I am of the same opinion and for the same reasons.

4.Mr.M.M.Hubalikar.

Q:- What is your opinion?

A:- I am of the same opinion and for the same reasons.

Sd/M.B.Honavar.

12-11-1946. Sessions Judge.

In the Court of the Sessions Judge of Belgaum.

Sessions Case No. 70 of 1946. Exh. 34

I m p e r a t o r

v.

1. Gundu Kall.ppa Ghatge of Janwad.
2. Laxman Krishna Rendale of do.

J u d g m e n t.

The charge against the two accused is that on 12.8.1946 at Janwad they and three others together beat Ratnappa Narsinga Magdum of Janwad with sticks all over his body and caused his death in furtherance of their common intention to cause his death and thereby committed an offence punishable under s.302 read with s.34 of the Indian Penal Code.

The story of the prosecution is briefly this. The accused No.1 Gundu Ghatge has a kinsman Laxman, who gifted a land of his to one Nagappa 20 years ago. On Nagappa's death his widow Bayja adopted one Basappa who sold the land to Ratnappa's son Shankar (exh.9) in the yeai 1941. The accused No.1 took a lease of this land from Shankar in the year 1941 but he was later evicted. He then took a lease from Laxman and began to obstruct Shankar's tenant. There were proceedings under s.145 of the Code of Criminal Procedure between Shankar as one party and the accused No.1 and Laxman as the other party. One of Ratnappa's brothers was beaten some years ago, and the accused No.1 was prosecuted. On account of all these reasons the accused No.1 had an ill-will against Ratnappa and had threatened to beat him. Ratnappa had obtained a decree against accused No.2's father and brought his house to sale in execution of the decree. The house was purchased by one Bhima 16/17 years ago, and Ratnappa purchased it from Bhima a year later. The accused No.2 was asking Ratnappa to take his money and resell the house to him; but Ratnappa refused 2/3 months before 12-8-1946. The accused No.2 and the accused No.1 were friends and so they designed to beat Ratnappa.

On the evening of 12-8-1946 when Ratnappa was returning fr his field and was going home these two accused and three others together attacked him in front of the house of one Balappa Rayappa (exh.8). Ratnappa's brother Rama (exh.5), his daughter Sharma (exh.6) and his daughter-in-law Parwati (exh.7) saw the accused beating Ratnappa and asked them not to beat; but Rama was beaten by these two accused and another and they came to assault Parwati who ran home and brought her mother-in-law. By that time the accused had left Ratnappa who was lying down on the road with several injuries all over his body.

The news of beating Ratnappa reached the village Patil Malgauda (exh.21) and he went to the place where Ratnappa was lying down, and questioned him and came to know from him that these two accused beat him. The Patil obtained a cot and got Ratnappa placed on it and took him to the police station at Sadalga, two miles away. There the Sub-Inspector Mr.Bhinge (exh.25)recorded his statement (exh.11) in which he said that these two accused and three others together beat him with sticks. Before he could sign the statement his life became extinct, and the Sub-Inspector registered the crime and held an inquest panchnama (exh.12) and sent the dead body of Ratnappa to the medical officer of Chikodi for post-mortem examination with constable Mahamad Usuf (exh.20). The medical officer (exh.22) held post-mortem examination, the result of which he recorded in a memorandum (exh.23). The examination revealed that there were 20 surface wounds and 2 fractures described in paragraphs 17 and 18 of Exh.23 as follows:-

1. An abrasion ½" x ½" just above the inner end of the left eye-brow.
2. An abrasion ½" x ½" over the right wrist just above the ring finger with swelling over the whole wrist.
3. Contused wound ½" x ½" skin deep over the distal third of the right thumb palmer aspect.

4. An oblique wheel mark 2½" x 1" over the right forearm front part at about its middle.

5. An oblique wheel mark 4" x 1" over the right forearm front part middle third.

6. There is discolouration and swelling over the whole of the left forearm outer part.

7. An oblique wheel mark 2½" x 1" over the right elbow outer part.

8. An oblique wheel mark 2½" x 1" below injury No.7.

9. An oblique wheel mark 2½" x 1" over the right arm outer part at about its middle.

10. An oblique wheel mark 3" x 1" over the left elbow outer part.

11. An oblique ~~xxx~~ wheel mark 3" x 1" over the left arm outer and lower third with a contused wound ¼" x ¼" skin deep at its lower end.

12. An oblique wheel mark 2" x 1" over the left shoulder outer part.

13. An oblique wheel mark 3" x 1" over the left forearm inner aspect middle third.

14. An oblique wheel mark 2½" x 1" over the left side back outer and lower part just above the iliac crest.

15. There is blackish discolouration over the whole of the left buttock.

16. An oblique wheel mark 4" x 1" over the right buttock at about its middle.

17. An oblique wheel mark over the right thigh back part middle third measuring 5" x 1".

18. Blackish discolouration over the whole of the right knee, back, outer and inner part with contused wound¼" x ¼" skin deep over the back at about its middle. The whole of the knee is swollen.

19. Contused wound ¼" x ¼" skin deep over the right knee front and middle part.

20. Two contused wounds each 1" x ½" bone deep over the right leg middle third front aspect about 1" apart from each other.

The bone below is obliquely fractured. There is swelling over the upper half of the leg.

There is haemorrhage near the ends of the fractured bones.

There is haemorrhage in the subcutaneous tissues of injuries Nos.1 and 2 and 4 to 18.

All the injuries are fresh ones and might have been caused by the parts coming in contact with hard and blunt substance.

Column 18.

1. Fracture of the lower and of right radius.

2. Oblique fracture of the right tibia at the junction of the upper and middle third.

The blood vessels and other soft structures near the fractured ends are lacerated.

The medical officer was of the opinion that death was due to shock and haemorrhage as a result of the several injuries sustained by Ratnappa.

The Sub-Inspector after sending the dead body recorded the statement of Ratnappa's brother Rama (exh.5) and saw that he too had received injuries, and got a panchnama (exh.13) made of the same and sent him to the medical officer for treatment. The medical officer (exh.22) examined Rama and noted down his injuries and treated them. Later he issued a certificate (exh.24) about those injuries which were :-

1. A pea-sized abrasion with swelling round about over the front of the left leg lower third about 1" to the outer side of the middle bone.

2. Swelling 3" x 2" over the inner aspect of the right leg at the junction of the middle and lower third.

3. Slight blackish discolouration over an area of 1" x 1" on the left thumb front aspect middle third.

The Sub-Inspector went to Janwad early next morning and got a panchnama (exh.15) made of the scene of offence shown by the Patil. He then recorded statements of the daughter and the daughter-in-law of Ratnappa and several neighbours. He made a search for the five persons named by Ratnappa but did not find them. On 14-8-1946 and 15-8-1946 he recorded statements of some more persons. The ~~fixxt~~ five suspects appeared before him on that day, and he arrested them and attached two sticks (articles 16 & 17) produced by these two accused by making a panchnama (exh.16). On 21-8-1946 he sent a charge-sheet against these two accused only, charging them with the murder of Ratnappa.

The Resident Magistrate First Class, Chikodi, held an inquiry and committed the two accused to this Court to take their trial for

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the offence of murder. In this Court on an application by the learned Public Prosecutor the charge was amended by adding s.34 of the Indian Penal Code to the charge of murder.

Both the accused plead not guilty to the charge. According to them Ratnappa was a village bully and must have been beaten by some one or more persons who had a grudge against him, and they have been falsely involved by their enemies.

So, the points for determination in this case are :-

(1) Whether it is proved that these two accused and some others together caused the death of Ratnappa ?

(2) If so, whether death was caused in furtherance of the common intention of these accused and some others ?

(3) Of what offence, if any, are the accused Nos.1 and 2 proved to be guilty ?

My findings are :- (1) No. (2) Does not survive. (3) None.

There ~~xxxxx~~ can be no doubt from the evidence on behalf of the prosecution that Ratnappa died in the police station of Sadalga between 9 and 10 p.m. on Monday 12.8.1946. There can also be no doubt from the evidence that he was beaten by some one or more persons on the evening of 12.8.1946 in front of Balappa Kayappa's house at Janwad, and that he died later at the police station where he was taken for making a complaint, and that his death was the direct result of the beating. The Police Patil Malgauda (exh.21) has sworn that that evening at about 5 he heard people running in front of his house saying that Ratnappa was beaten; that he then went to the place where Ratnappa was lying down in front of Balappa Kayappa's house; that he saw that Ratnappa had received injuries; that he asked Ratnappa who beat him; that Ratnappa told him that these two accused beat him and desired that

he should be taken to Sadalga; that he therefore took him to Sadalga police station; that there he made a statement to the Sub-Inspector that these two accused and three others together beat him; and that he expired in the police station itself; and that then an inquest panchnama was made. Ratnappa's brother Rama (exh.5) supports this statement of the Patil. But the Sub-Inspector (exh.25) has stated that the Patil and Ratnappa came to the police station that evening at about 8 p.m. for making a compl·int; that he recorded the information given by Ratnappa that Ratnappa expired soon after he gave the statement; and that he then held an inquest over the dead body and sent the dead body with the constable (exh.20) to the medical officer of Chikodi for post-mortem examination. Shivappa Basappa (exh.10) has sworn that he was called to the police station on the night of 12.8.1946 to serve as a panch; that Ratnappa of Janwad made a statement to the Sub-Inspector about the beating; that he expired soon after the statement; and that an inquest panchnama was then made of the injuries on his body. Exh.12 is the panchnama of those injuries. The medical officer of Chikodi (exh.22) has sworn that a constable of Sadalga brought the dead body of one Ratnappa to him for post-mortem examination on 13.8.1946, and that he held post-mortem examination the same afternoon and recorded the result of the examination in a memorandum (exh.23), the contents of which he has sworn are all correct. He has further stated that there were ante-mortem injuries on the body of Ratnappa as described in paragraphs 17 and 18 of exh.23, and that death was due to shock and haemorrhage as a result of the multiple injuries, and that the injuries taken together were sufficient in the ordinary course of nature to cause death. In addition to this evidence there is the evidence of Ratnappa's daughter Sharma (exh.6) and his daughter-in-law Parwati (exh.7), showing that Ratnappa was hale and hearty

that evening until he was beaten by these two accused and some others, and that when he was lying down on the road after the accused left him the Patil came there and took him away to Sadalga.

From all this evidence it is clear that Ratnappa was beaten by one or more persons on the evening of 12-8-1946 and that he died as a result of the beating 3/4 hours later. The accused do not deny that Ratnappa was beaten or that he died as a result of the beating. They say that on the next day they heard that Ratnappa was beaten and that he died at the police station at Sadalga. It is therefore clear that Ratnappa is dead and that his death was homicidal.

The next question to be considered is what offence is committed against Ratnappa. It will be clear from the direct evidence, the injuries referred to before and the evidence of the medical officer that the weapons used were only sticks and that the parts of the body on which the injuries were caused are one and all non-vital, and that the injuries taken separately are all minor ones. The medical officer has however stated that injury No. 20 might have been by itself sufficient to cause death if it was not treated. He does not say that death would have been the sure consequence of that injury. He only says that it was probable that death might have been caused. If the assailant or assailants intended to cause death or to cause such bodily injury as was likely to cause death, then they would have chosen vital parts like the head or the chest or the abdomen for giving the beating. But here we find that the beating is all on the two hands, the two buttocks and the leg - Ratnappa had only one leg, the other having been amputated when he was being treated for another crime against him. So, the intention of the assailants appears to be to give him a severe beating and not such beating as was likely

to cause his death, All the same it must be said that the assailant or assailants must have known that on account of so many blows given by them death was a likely result. Every person is presumed to know the consequences of his own act. In this case death has followed within 3/4 hours of the beating. The injuries grouped in the memorandum of post-mortem examination are 20; but most of these injuries appear to have been caused not by one blow but by several blows delivered at the same place. So, the offence committed will not be merely grievous hurt but will be culpable homicide as defined in s.299 of the Indian Penal Code. At the same time it cannot be said that the act by which the death was caused was done with the intention of causing death or with the intention of causing such bodily injury as the offenders knew to be likely to cause death, or that the bodily injury intended to be inflicted was sufficient in the ordinary course of nature to cause death, or that the offenders knew that their act was so imminently dangerous that it must in all probability cause death or such bodily injury as was likely to cause death. I am therefore of the opinion that the offence committed in this case is not murder but culpable homicide not amounting to murder. All the four assessors are unanimous in the opinion that the offence committed is one punishable under s.304 Indian Penal Code. I agree with that opinion.

The main question which remains to be considered is whether it is proved that these two accused took part in the beating which caused the death of Ratnappa. The only evidence to prove this fact is the direct evidence of Ratnappa's brother Rama (exh.5), Ratnappa's daughter Sharma of 9/10 years (exh.6), and his daughter-in-law Parwati (exh.7) and a neighbour Balappa Rayappa (exh.8), and the statement said to have been made by Ratnappa to the police Patil of Janwad and to the Sub-Inspector and the panch at the

police station of Sadalga. There is also the evidence of motive i.e. of ill-feelings between the deceased and these two accused. It has therefore to be seen how far this evidence is reliable and whether all the evidence taken together proves beyond reasonable doubt that these two accused were concerned in causing the death of Ratnappa.

I shall first of all deal with the circumstantial evidence of motive. There can be no doubt that where there is direct evidence it is not necessary for the prosecution to prove any motive. But because evidence has been led and because generally an offence like murder or culpable homicide is not committed without a strong motive I shall proceed to discuss the evidence of the alleged motive. Rama (exh.5) has stated that his brother purchased in an auction sale held by a Court the house of accused No.2 about 8 years ago and that about 3/4 months before this offence the accused No.2 was asking him to resell the house to him, and that his brother refused to do so. He has also said that 7/8 years ago the accused No.1 had beaten his another brother Jotiba and that he was saying to Ratnappa that he would beat him also; that one Laxman Ghatge - accused No.1 is a Ghatge had made a gift of his land to his nephew Nagappa; that on Nagappa's death his widow , one Bayja, xxx sold the land to Ratnappa about 5 years ago, and that last year the accused No.1 began to quarrel with Ratnappa about that land. He has however said xxx in cross-examination that the gift by Laxman may be more than 20 years ago and that there is no relationship whatsoever between Laxman and the accused No.1, and that the accused No.1 had nothing to do with the adopted son Basappa and that he had no reason whatsoever to quarrel with Ratnappa on account of the land. He has further admitted that Laxman Ghatge was in possession of the land even after the gift and that Basappa and his

adoptive mother filed a suit for possession against Laxman and the suit was dismissed, and that after the dismissal of the suit Ratnappa purchased the land, ~~xxx~~ that Laxman Ghatge is still alive, that there is a proceeding now pending under s.145 of the Code of Criminal Procedure, and that Laxman is a party to that proceeding along with accused No.1.

The only other ~~xxidxxxx~~ witness on this point is Ratnappa's son Shankar (exh.9) who has said that the accused No.1 is a son of the first cousin of Laxman Ghatge, that the accused No.1 and Laxman were living together and that his father who purchased the land from Basappa in 1941 got possession from Laxman and gave a lease to the accused No.1 in the year of purchase, and that next year he granted a lease to a third person and in the third year the accused No.1 asked for a lease to him but he was refused. He has stated that on this account the accused No.1 went to Laxman Ghatge and gave him a kabulayat and came to obstruct his tenant. In cross-examination he has however admitted that the accused No.1 has his land and house separate from Laxman's. It is therefore not likely that the accused No.1 and Laxman would be living together. Further, when Basappa did not succeed in his suit for possession against Laxman it is not likely that Laxman would give up possession to Ratnappa in the year of his purchase 1941. The Patil has admitted that Ratnappa was in the habit of purchasing litigation i.e. of purchasing properties in dispute and then filing suits. It may be that Ratnappa wanted to take possession of the land from Laxmanby force and that Laxman obstructed him and therefore he started a proceeding under s.145 of the Code of Criminal Procedure. The accused No.1 has denied that he is a party to that proceeding and that he filed a written statement in that proceeding saying that he had nothing to do with the

land. But his pleader has suggested in the cross-examination of Rama and Shankar that the accused No.1 is also a party to the s.145 proceeding and that he has filed a written statement had nothing to do with the land. Being a kinsman it is likely that accd. no.1 saying that he was siding with Laxman and so Ratnappa could not easily get possession of the land. There may therefore be ill-will between Ratnappa and the accused No.1 on that account. But it is more likely that Ratnappa would beat the accused No.1 on that account rather than the accused No.1 would beat Ratneppa. In fact the prosecution witness Balappa Rayappa (exh.8) near whose house the beating has taken place has stated that first there was an exchange of words between Ratnappa and the accused No.1 and that Ratnappa first gave two blows to the accused No.1 and that the accused No.1 snatched the stick in the hands of Ratnappa and gave him two blows and that the accused No.2 then came and stood there and did not do anything as long as the witness was there, and that the witness then went away because he was leading a cow which began to give trouble. It was suggested to him by the learned Public Prosecutor that he was a friend of the accused; but he has stoutly denied that suggestion. He is a Magdum just like Ratnappa, and there is no reason why he should give false evidence to favour the accused Nos.1 and 2. According to him the incident took place at 2/3 hours to sunset whereas the beating referred to by Rama, Sharma and Parwati must have been at an hour to sunset, as stated by Parwati (ex.7). It is therefore quite likely that after Ratnappa beat the accused No.1 and the accused No.1 snatched the stick from Ratnappa and gave him two blows, the accused No.2 and others might have come there and they might have beaten Ratnappa. So, it cannot be said that the evidence of Balappa Rayappa runs counter to the evidence of the relatives of Ratnappa. It may

only show that the event which Rama, Sharma and Parwati are speaking of took place some time after the event referred to by Balappa Nayappa.

As regards the motive alleged against accused No.2, Shankar (exh.9) has stated that his father obtained a decree against the father of the accused No.2 and brought his house to sale and that the house was purchased by one Bhima who a year after the auction purchase sold it to Ratnappa. He has no personal knowledge of the accused No.2 asking his father to return the house to him taking back his money. In examination-in-chief he said that his father told him that the accused No.2 asked him to take back his money and to return the house to him and that he refused to do so. But in cross-examination he has admitted that the house of the accused No.2 was in their possession for the last 16 years and that it was only two months before this offence that the accused No.2 asked for the return of that house, and that all that his father told him was that the accused No.2 had come. Rama (exh.5) has on the other hand said that the accused No.2 was not asking for resale of the house but was saying that the house was his, and that Ratnappa had no title to it and so it should be restored to him. There is no reason why after keeping quiet for 16/17 years after Ratnappa purchased the house from the auction-purchaser the accused No.2 should ask for either return for no consideration or for resale of the house to him only two months before the commission of the crime. It does not appear from the prosecution evidence that there was anything common between accused No.1 and accused No.2 or the three other persons, who are said to have joined the accused Nos.1 and 2 in the beating. The prosecution wanted to show that the accused Nos.1 and 2 are friends. But all that Shankar (exh.9)

said was that the accused Nos.1 and 2 were on cordial terms, and that the accused Nos.1 and 2 beat his father on account of the dispute about the land.

Rama (exh.5) has also said that 7/8 years ago the accused No.1 had beaten his another brother Jotiba and that he was threatening to beat Ratnappa also. But he did not mention this threat in his statement to the Sub-Inspector or in his evidence in the committal Court, though he now says that he did mention the threat in his evidence in the committal Court. Ratnappa was once before beaten and his leg had to be amputated for it. At that time he had prosecuted the accused No.1, Shivappa Rama and Baya's Devu and all of them were acquitted. Shivappa Rama and Baya's Devu are two of the other three persons mentioned by Ratnappa in his dying declaration. Ratnappa's another brother was also beaten 7/8 years ago, as stated by Rama and Shankar. Shankar was also beaten and he had filed a complaint in 1942 against the accused No.1 and some others. The accused No.2 had nothing to do with all these events; and so there is no reason why only two months ago he should have joined the accused No.1 or Shivappa Rama or Baya's Devu, i.e., Devgauda Bhimgauda, to beat Ratnappa. On the other hand, because the prosecution of the accused No.1 and Shivappa Rama and Baya's Devu failed in the last, it is quite likely that Ratnappa and his people have thought it fit to involve the accused No.1, Shivappa Rama and Baya's Devu once again. On the whole, there is no evidence of a strong motive for the accused No.1 to beat Ratnappa so as to cause his death. There is no reliable evidence of motive for the accused No.2 to beat Ratnappa.

As I said before where there is direct evidence it is not necessary to prove motive which so often may be hidden. It

has therefore to be seen whether the direct evidence proves the guilt of these two accused beyond reasonable doubt. Rama (exh.5) has stated that at about 5 p.m. that day when he was returning from a temple he saw these two accused and three others beating his brother with sticks near Balappa Rayappa's house; that he went to stop them but he was also beaten with sticks, and that ~~the~~ Ratnappa's daughter Sharma, his daughter-in-law Parwati, Balappa Rayappa and several others were standing there at the time, and that the Patil arrived there after the assailants left and asked Ratnappa what happened, and that Ratnappa told the Patil that these two accused and three others together beat him. He has further stated that his brother was taken to the police station where panchas were called and the Sub-Inspector questioned Ratnappa in the presence of panchas, and that Ratnappa told him that these two accused and three others together beat him. According to his statement in this Court he had gone to Ratnappa's house at 4 p.m. that day and thereafter Ratnappa went to his land and he went to his house and some time later he went to the temple and it was when he was returning from the temple that he saw the beating going on. The Sub-Inspector (exh.25) has prepared a sketch (exh.26) of the scene of the offence and its surroundings. The temple is shown there and also a well on the way to the temple. Sharma and Parwati were at the well. It will be clear from the sketch that those at the well or at the temple will not be able to see anything happening on the scene of the offence until they come to the road to a point 50 feet from the scene of the offence. Rama said that the temple was only 30/35 cubits from the place of beating, whereas from the sketch it would appear that it is 200 feet. Rama said that it was when Ratnappa was returning from his field and was ahead of him that he was beaten. He has furtner said that he

saw Ratnappa going and saw these two accused and three others together beginning to attack him. ~~He had made a statement to the Sub-Inspector only a few hours after the beating.~~ He then said that when going to the temple he met his brother returning from the field and going towards his house and that when he went near the temple he heard his brother crying "Ayyo", and that he then ran back and saw his brother being beaten by these two accused after throwing him down. He did not then mention that there were three others with these two accused who were beating his brother. He has admitted that he made that statement to the police. He has also said that what he told the Sub-Inspector was the truth. It is therefore clear that he is now trying to improve on his original story in order to show that he has seen the beating from the beginning to the end, and that he wants to show that the statement in the dying declaration that five people together beat is correct. Although in examination-in-chief he said that Ratnappa's Rayappa's daughter and daughter-in-law were there at the time of the beating, in cross-examination he said that the daughter and the daughter-in-law were taking water from the well when the beating was being given and that both of them reached there after him. He has also said that when he went to the place of beating Balappa Rayappa, Laxman Jotiba Magdum and Laxman Krishna Magdum were there, and that Kallappa Ghatge came there after him. The evidence of Balappa Rayappa (exh.8) has been referred to before. He does not speak of the beating given by accused No.2 or the other three persons. He does not speak of any persons at the place of beating. Rama has admitted that the two Magdums and Balappa Rayappa are their kinsmen. The Sub-Inspector has questioned Laxman Krishna Magdum and Kallappa Ghatge; but he has not cited them as witnesses. from

which it would appear that they did not see anything or at any rate were not willing to support the prosecution case... If they have really seen who beat, there is no reason why being kinsmen of the deceased they should refuse to support the prosecution case unless the pro.ecution case was not true. It is true that Rama (exh.5) had some injuries on his person and that a panchnama (exh.13) proved by the panch (exh.10) was made about them, and that the medical officer (exh.22) found some injuries on him when he examined him on the next day, as shown in the certificate (ex.2 But the medical officer has admitted that two of these injuries might be caused by a fall. He says that when the Patil arrived he was present there. If it was true, there is no reason why the Patil should not ask him what happened. He does not say that the Patil asked him, nor does the Patil say that he asked him Rama, or that Rama told him that he was beaten. I have said before that Balappa Nayappa has not mentioned the presence of Rama when he saw the accused No.1 giving two blows to Ratnappa. His niece Sharma (exh6) and his daughter Parwati (exh.7) do not mention that he was beaten by any of the assailants, though they say that Rama was present when Ratnappa was beaten. In this Court Rama said that he was given six blows in all and with sticks. But to the Sub-Inspector he said that the accused No.1 alone beat him and gave him 4/5 blows. Although he denied that he made that statement to the Sub-Inspector, the Sub-Inspector (exh.25) has sworn that Rama did make that statement to him. Similarly, Rama said that he did tell the Sub-Inspector that the accused No.2 and Devu also beat him; but the Sub-Inspector (exh.25) has sworn that Rama did not tell him that accused No.2 or Devu beat him. It may be that Devu beat him. It may be that Devu, Shivappa Rama and a third person together beat Ratnappa, and that the accused

Nos.1 and 2 are being falsely involved on account of enmity.

Sharma (exh.6) who is a girl of 9 or 10 years has sworn that the accused No.1 first beat her father on the leg and that the accused No.2 then came and beat him on the leg and that her father dropped down; that Shivappa and Rama then came and began to beat her father; that her sister-in-law Paru arrived there and raised cries and asked the assailants to leave her father but they continued to beat him, and that Paru then went home and brought her mother, and that by that time the assailants had left and run away. She said that she did not notice who else except her uncle Rama were present there. But Parwati, her sister-in-law, ~~MMM~~ (exh.7) has said that there were 6/7 others standing who saw the beating, but that she did not know who they were. It is admitted that Sharma and Parwati had gone to the well near the temple to fetch water. Sharma now says that she left the rope at the well with Paru, and was returning home, and then saw her father being beaten, and that her father was about 20 feet in front of her when he was attacked. She denied that someone came and told them at the well that her father was being beaten. She denied that she made a statement to the police that when she and her sister-in-law were at the well Sonubai came there and told them that the accused No.1 Gundu was beating her father, and that they then ran to the place of beating. She has also denied that she told the Sub-Inspector that they saw only accused Nos.1 and 2 beating her father who had fallen down. But the Sub-Inspector (exh.25) has sworn that Sharma and Paru told him that when she and Paru were at the well Sonubai came there and told them that Gundu was beating her father and that then they went to the scene of the offence, and that she also told them that her father was thrown down and that Gundu and Laxman were

beating him. He has clearly stated that she did not tell him that any others besides the accused Nos. 1 and 3 were beating her father. Her statement was recorded by the Sub-Inspector on the next day when the event was quite fresh in her mind. She did not then say that three others along with accused Nos. 1 and 2 were beating her father. She then said that she ~~xx~~ saw only accused Nos. 1 and 2 beating him. She ~~xxx~~ is now making an improvement on her original version in order to show that the dying declaration of her father in which the names of five persons are given is true. Sonubai was questioned by the Sub-Inspector, as admitted by him. But she has not been called as a witness. That will go to show that she is not willing to support the statement made by Sharma and Parwati to the police that she went to the well and told them that the accused No. 1 was beating Ratnappa. Because Sonubai is not willing to support the statements made by these two ~~two~~ witnesses Sharma and Parwati to the police ~~when~~ that she gave them the information about the beating, Sharma now denies that she was on the well and that Sonubai came there and told them that Ratnappa was being beaten by the accused No. 1. But Parwati, her sister-in-law, (exh. 7) has admitted that when her sister-in-law and she were drawing water Sonubai came there and told them that Ratnappa was being beaten, and that they also heard his cries. But in the next breath in order to support her sister-in-law Sharma's statement she said that Sharma dropped the rope on the well and returned with her father, and that she was alone drawing water when Sonubai told her of the beating. But in her statement to the police she said that Sharma was also with her when Sonubai came and told them of the beating, and that thereafter she and Sharma went to the place of beating. Although she denied that she made that statement to the Sub-Inspector the Sub-Inspector (exh. 25) has clearly admitted that she told him

that Sharma and she were at the well when Sonubai came and told them that Ratnappa was being beaten, and that she and Sharma together went to the scene of the offence. The sketch (exh.26) will show that the well is about 120 feet from the scene of the offence. Sonubai must have travelled a distance of 120 feet after seeing the beating; and after she told these two girls of the beating the girls must have travelled 70 feet before they could come to the road wherefrom they could see the beating. It is very doubtful whether the offenders remained there until all this time, so that these two girls might be able to see them. Sharma has said that on seeing the beating she raised cries, but no one came there from the houses roundabout until the accused ran away. At the end of her statement she has admitted that her uncle Rama took her and her sister-in-law Parwati to the police. It is therefore quite likely that Rama tutored these girls to give evidence against the accused Nos.1 and 2 though they had not seen who had committed the crime, the assailants having run away by the time they returned from the well.

Parwati (exh7) has said that the place of beating is about 30 feet from the well, whereas in fact it is four times as much. She has said that when she was returning from the well she saw 4/5 persons beating her father-in-law with sticks and that she knew only two of them and not the rest, and that these two were these two accused. She first said that Rama, Sharma and she were the only persons who saw the beating. But later she admitted that there were 6/7 others who saw the beating by standing at a distance. She has said that the Patil came there and asked Ratnappa who beat him, and that Ratnappa told the Patil that 4/5 persons beat him and gave him five names, but that she could remember only the names of these two accused. But the Patil Malgauda (exh.21) has stated that

he asked Ratnappa who beat him, and that Ratnappa told him that Laxman and Gundu beat him. Parwati has said that she did tell the Sub-Inspector that 2/3 others whom she did not know were also beating Ratnappa along with these two accused. But the Sub-Inspector (exh.25) has stated that Parwati did not tell him that 2/3 others whom she did not know were also beating Ratnappa along with these two accused.

Then we come to the dying declaration of Ratnappa (exh.11) recorded by the Sub-Inspector at the police station. Rama (exh.5), the Police Patil Malgauda (exh.21), the Sub-Inspector (exh.25) and the panch Shivappa (exh.20) say that Ratnappa made a statement to the Sub-Inspector as contained in exh.11. That statement is as follows:- "This day, at about 5 o'clock in the evening, I and my brother Rama were returning home after going to the temple. Then on the way when (we) came in front of the house of Balappa Magdum of our place (1) Gundappa Kallappa Ghatge (accused No.1), (2) Devgauda Bhimgauda Patil, (3) Laxman Krishna Rendale (accused No.2), (4) and Shivappa Rama Rampure, (5) Rama Balu Dhang, of Janwad came suddenly and beat me with sticks in their hands on leg, on two hands, on back, on chest and on the head. Due to the beating the knee-bone of my right leg is broken. Blood has come out from this injury and also from the injury to my left arm. There was a dispute between me and Gundappa Kallappa Ghatge in the past about a land. On account of that ill-will I and my brother are beaten today."

It will appear from this statement that the story is that Ratnappa and his brother were together returning home after going to a temple when Ratnappa was suddenly attacked by five persons who suddenly appeared in front of Balappa Nayappa's house. Rama has on the other hand said that his brother was returning from his field and that he alone had gone to the temple. The daughter and the daughter-in-law have also said that Ratnappa had gone to his

and and was returning home when he was beaten. There is, therefore, no corroboration of the statement in the dying declaration that it was when he was returning from the temple with his brother that he was attacked. The evidence of Balappa Rayappa (exh.8) is to the effect that there was first an exchange of words between Ratnappa and the accused No.1, and that Ratnappa first beat the accused No.1 with a stick and then the accused No.1 snatched the stick and gave two blows to Ratnappa. But the story in the dying declaration is that the five persons appeared all at once and began to beat. Further, the parts of the body on which the beating was given are mentioned in the dying declaration, and it is said that blows were given on the chest and also on the head. But from the post-mortem examination (exh.23) it will be clear that there were no injuries on the chest or on the head, and that there was only a small abrasion on the right eye-brow and that it might have been caused by a fall, as admitted by the medical officer. Lastly, the dying declaration does not mention that there was any ill-will between him and the accused No.2, though now his son and his brother say that the accused No.2 had asked for return of the house. It is thus clear that the evidence led does not corroborate the dying declaration in any particulars. Although an attempt is now made by all the eye-witnesses to corroborate the dying declaration by saying that these two accused and 2/3 others together beat, in their statements to the police made shortly after the offence they did not say that any others besides these accused gave the beating. It has, therefore, to be said that the dying declaration is not corroborated by the evidence on behalf of the prosecution.

The defence disputes that the deceased Ratnappa made the statement (exh.11). The statement is attested by two panchas, one of whom was examined in the committal Court. He was present in

this Court but was not examined; and another panch who was not examined in the committal Court has been examined in this Court; and the suggestion on behalf of the defence is that that panch would not support the story that Ratnappa made the statement (exh.11). According to the Sub-Inspector (exh.25), the Patil and Ratnappa came to the police station at 8 p.m. that day in order to make a complaint, and he got Ratnappa's statement recorded shortly thereafter. He has stated that the recording of the statement required about 20 minutes and that it was finished by about 9.20 p.m., and that his signature was not taken to exh.11 because he died in the meantime. In this Court the Sub-Inspector said that the death might have taken place at about 9.20 p.m. In the committal Court he said that it might be at 10 p.m. He has however admitted that as soon as he died the inquest panchnama was commenced with the help of the same two panchas. The panch Shivappa (exh.10) has also said the same. The panchnama (exh.12) mentions that it was commenced at 10-20 p.m. and that it was finished at 11-30 p.m. The time when the statement was made is not mentioned in exh.11. The Sub-Inspect says that he questioned Ratnappa in Marathi and that Ratnappa gave answers in Marathi and that he rendered them in Kannada and made a constable write down the statement exh.11 in Kannada. But the panch Shivappa (exh.10) knew Kannada and Marathi. There is no reason why he was not made to write exh.11 in Marathi itself. Exh.10 and the Patil (exh.21) said that a constable rendered the Marathi answers into Kannada, and that another constable recorded the statement exh.11. From the evidence of two other panchas (exhs.14 & 17) who have made a panchnama (exh.16) about the attachment of the sticks (arts.16 & 17) it would appear that although the accused Nos.1 and 2 did not produce any sticks the Sub-Inspector has got the panchnama (exh.16) made to the effect that the accused Nos.1 and 2 produced the sticks. From the inquest panchnama (exh.12) it would appear

that the panchas were called to make a panchnama of the injuries on Ratnappa. The Sub-Inspector has also admitted that in other cases whenever he records the information given to him of any cognizable offence he does not call panchas to attest that information which is recorded under s.154 of the Code of Criminal Procedure. The panchnama, though in Kannada and though made immediately after the dying declaration, is written by a person different from the one who has written exh.11. From all these circumstances it appears to me that the suggestion on behalf of the defence that Ratnappa did not make any statement, that exh.11 was kept ready for the panchas to sign, and that the panchas were asked to sign it without their knowing what it was and that is why the other panch examined in the lower Court would not support the prosecution and therefore he has been left out, is not without justification. When it is admitted that Ratnappa died immediately after making the statement even before he could sign it it is very difficult to believe that he was in a fit condition to make a statement at the time it is said he made the statement exh.11. I am therefore not convinced that the statement (exh.11) is really the statement of Ratnappa.

Assuming that it is Ratnappa's statement and that it is admissible in evidence under s.32 of the Indian Evidence Act, the question remains about the evidentiary value of that statement. It is not clear from the evidence whether it was made in immediate expectation of death, though Rama now says that his brother said that he was dying and that further particulars should be obtained from him, i.e., from Rama. It was not made in the presence of the accused or on oath in the presence of a Magistrate. It was not subjected to cross-examination, and so it cannot be acted upon unless there is some reliable corroboration. In Emperor v. Akbarali Karimbhai (35 Bom.L.R.1021) our ~~own~~ High

has held: "As a dying declaration is not made on oath and is not the subject of cross-examination, it is a weaker type of evidence than the evidence given by a witness in the witness-box. If a Judge thinks that part of a dying declaration is deliberately false, he should not act upon the other part of the declaration at any rate without very definite corroboration. If something in a dying declaration is false, the whole declaration must not necessarily be disregarded. A declaration.....not made by one in ~~imminent~~ immediate expectation of death and not made in the presence of the accused should not be acted upon unless there is some reliable corroboration. This rule applies with extra force in a case where there is a good deal of evidence which is deliberately false". In this case as I have pointed out before, the dying declaration is entirely different from the story which the eye-witnesses - the brother, the daughter and the daughter-in-law of the deceased - told the police soon after the offence. In order to corroborate the dying declaration they have now given evidence denying that they made statements to the police contrary to the dying declaration. Under these circumstances and when there is not a single independent witness, I think it would be unsafe to rely ~~to rely~~ on the interested evidence of the brother, the daughter and the daughter-in-law of the deceased and to convict these two accused. It may be that the deceased and his brother were beaten only by the other three persons mentioned in the dying declaration (exh. 11), and that on account of enmity Ratnappa and his relatives wanted to involve these two accused also. The Sub-Inspector had arrested the other three persons also, but he did not send a charge-sheet against them but he let them off, probably because Rama, Sharma and Parwati did not in their statements to him say that the other three persons also took part in

ne beating. When the deceased had given five names to him and when the witnesses ~~only~~ gave only two names the Sub-Inspector should have clearly asked the eye-witnesses whether the three others were concerned in the crime or not; and if they had said that they were not concerned he should not have arrested them at all and detained them for some time. If it was a case where other witnesses were not present it would have been a different matter. But the crime was committed in broad daylight in a crowded locality. It is admitted that neighbours had all seen the commission of the crime. It is further admitted that these neighbours are the kinsmen of the deceased. That being so, it should not have been difficult for the prosecution to secure their evidence if it was true that these two accused were really concerned in committing this crime. In the absence of any disinterested witnesses, merely because the names of these two accused were given in the dying declaration and were also mentioned by the brother, the daughter and the daughter-in-law in their statements to the police, I ~~do not~~ think that it would not be safe to convict these two accused. I find that the case of the two accused is not free from reasonable doubt, and that giving them the benefit of the doubt the two accused should be acquitted.

All the four assessors are unanimous in the opinion that the two accused are guilty under s.304 read with s.34 of the Indian Penal Code. The reasons given by them for this opinion are that there were ill-feelings between the deceased and the accused, and so they must have designed not to kill but to beat him severely, and that they believe the eye-witnesses Rama, Sharma and Parwati; that they do not believe that Balappa Rayappa has told the truth, and that they believe that Ratnappa did make a statement as contained in exh.11, and that it may be

that the accused Nos.1 and 2 first beat and then the other three joined them. To me it appears that the assessors have followed the line of least resistance by accepting the evidence of the three relatives who said that they saw these two accused beating. It is nobody's case that the accused Nos. 1 and 2 first beat and then the other three joined them. It is only Balappa Rayappa who has said that the accused No.1 first beat in self-defence and then the accused No.2 arrived there and stood there. But the dying declaration (exh.11), which the assessors believe, does not say that accused Nos.1 and 2 first beat and then the other three joined them. On the other Hand, it says that the five appeared all at once and beat him and his brother. To me it appears that the assessors have looked at the evidence only from the surface without trying to go deep into the evidence.

For the reasons given before I find myself unable to agree with the opinion of the assessors though it is unanimous. Disagreeing with the opinion of the assessors I find both the accused not guilty and acquit them and set them at liberty.

13th November 1946.

(sd.) M.B.Honavar

Sessions Judge.

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In the court of S.N.Nadgauda, Esqr., Resident Magistrate, F.C., Belgaum.

.....

Criminal Case No.257 of 1945.

Imp.

Vs.

(1) Shankar Narayan Pawar,
(2) Yadu Sambhaji Hattikar,
(3) Gopal Vithal Valvekar,
(4) Ganapat Gopal Patil,
(5) Irappa Mahadev Agashimani,
(6) Bhaskar Govind Athavale,
(7) Laxman Shidappa Sutar and
(8) Vishnu Ratoba Mesari, all of Belgaum.

Offence:--

Sections 4 and 5 of the Bombay Prevention of Gambling Act.

Judgment.

Mr.V.R.Hegde Police Sub-Inspector, Belgaum City (Ex.1) having got information that Houses Nos.1267(part) and 1342 in Basawan Galli occupied by accused No.1 were used as common gaming houses, obtained the search warrant at Ex.1-D from the S.D.Magistrate, F.C., Belgaum City to raid those houses. Armed with the warrant he made a raid upon House No.1342 only on 7-4-45 at about 10-30 P.M., having sent a --- punter in advance who was instructed to stake the marked one rupee notes given to him. Accused No.1 and 8 others and the punter were in the house. A small slip of paper was found with the punter with some figures and alphabets written thereon. As directed the punter had -- bet Rs.3/- (the marked three one rupee notes) on some numbers and the slip showed that he had so bet and that accused No.1 had accepted the bet of Rs.3/-. The marked notes were thereafter with other property. Panchanama of search was drawn. It is at Ex.1-B. Parashram Shattu Shirodkar (Ex.2) is the punter. He states what he did and explains the technique of the betting. Accused No.1 wrote and gave him the -- slip after accepting the bet. Shankar Laxman Khanavkar (Ex.3) is the panch in whose presence the marked one rupee notes were given to the punter and the house was afterwards searched. The prosecution have examined one of the accused as a witness under section 10 of the --- Gambling Act and he corroborates the punter and the Police-Sub--Inspector.

Mr.V.R.Hegde Police Sub-Inspector (Ex.1) states that the gamb--ling was "Satta or cotton features" gambling. Probably the correct name is 'Satta or cotton futures". The prosecution have examined Mr. Ganiyar Police Sub-Inspector, Belgaum Cantonment (Ex.4) to explain this sort of gambling.

Originally the Police sent up a charge sheet against nine accu--sed. One of them, viz. Nijayya Shidayya Sarvahnavar at Ex.5 having been examined as a witness under section 10 there now remain only -- eight accused. Their statements are at Exs.7 to 14.

Accused No.1(Ex.7) says that house No.1342 did not belong to him nor was it in his occupation. He did not keep a common gaming house and he did not gamble. All this is got up by the Police who had also brought a packet of playing cards and surreptitiously kept ~~of playing cards and~~ it there in order to create evidence and -- involve him and the other accused.

The other accused say ditto to accused No.1.-

The question is whether accused No.1 is guilty of the offences under sections 4 and 5 and any one of accused Nos.2 to 8 of the ~~offx~~ offence under section 5 only - they having been charged with those -- offences under the Gambling Act. My answer is that none can be held guilty.

In the first place accused No.1 boldly asserted that the house did not belong to him nor was it in his occupation. At the time of argument I brought this to the notice of the Police Prosecutor, who said that had the accused been a tenant it would have been incumbent

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incumbent on the part of the Prosecution to prove the tenancy and hat as the accused was the owner and as the Police Sub-Inspector said so and as there was a mention to that effect in the panchanama no independent proof was required. I am unable to follow this argument. As the accused made the bold statement the Police ought to have gone at once and seen whose name was shown as owner in the municipal house register and then ought to have applied as boldly for the court's permission to put in an extract from the said --- register to show that the house did belong to him. Now I shall not at all be wrong if I presume that accused No.1 was neigher the owner nor the tenant of the house bearing municipal number 1542. As a -- matter of fact that was the case and the Police must have come to know it afterwards. Therefore they kept quiet.

The prosecution did not prove that the figures etc. on the -- papers that were attached were in the handwriting of the accused. In the search a slip of paper (article No.24) was found on the person of the punter (Ex.2). There are some figures and alphabets on the slip. The punter says:--

" Accused No.1 gave me the slip showing the numbers and the amoung stacked thereon."

Excepting this there is absolutely no evidence to prove the handwriting on article No.24. Though much is said about the ---- technique of betting and about the manner how one should understand the figures there is absolutely nothing to prove the handwriting of the accused.

The learned pleader for the accused cited two cases (1) Emperior V.Harilal of 1957-59 B.L.R.-615 and (2) Emperior Vs.Bapuji of 1959 - 41 B.L.R.-974. Those cases are similar to this. Their -- Lordships did not put any reliance on punters and others of that class and remarked:--

" These gambling cases no doubt present difficulties. People who indulge in gambling naturally endeavour to conceal the true nature of their operations and it is difficult for the Police to prove their case. But at the same time a charge of gambling like any other criminal charge must be proved by the Prosecution by proper evidence and we cannot fail to note that a false charge of gambling is one very easy to frame."

There are the punter and the approver (Exs.2 and 5) and it is unsafe to base a conviction on their testimony when there are defects in the evidence from the very start, viz. ownership of the house itself.

In short the prosecution has failed to prove their case against any of the accused. No offence is proved against accused No.1 and as a consequence no offence is also proved against any of the other --- accused. I acquit them all. Section 258, Cr.P.C.

I shall pass orders regarding muddemal afterwards.

Sd. S.N.Nadgauda,
Resident Magistrate, F.C., Belgaum.

Belgaum,
18-6-45.

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Judgment recorded by the High Court in Criminal Appeal No. 582 of 1945 in the case of Imperator Vs.Shankar Narayan Pawar No.1 and ors No.2 & 3 and 6to 8.

By the Government of the Province of Bombay.

The Government Pleader for the Crown.

Mr.R.M.Kalagate ,Advocate ,for the accused.

Coram:- Stone C.J. and Lokur J.

'2nd December 1946.

Oral Judgment (Per Lokur J) :-

This is an appeal by the Government of the Province of Bombay against the order of acquittal of the opponents by the Resident Magistrate,First Class,Belgaum,who tried them for offences punishable under sections 4 and 5 of the Bombay Prevention of Gambling Act.

On April 5,1945 Mr.Hegde the Police Sub Inspector,Belgaum City,received information that gambling was going on in the house of accused No.1 and he obtained a warrant under section 6of the Act from the Sub-Divisional Magistrate, First Class. Then on April 7,1945 he sent one Parsharam Shattu with three marked notes of one rupee each to the said house to gamble on certain figures of American futures.Before he was sent, a panchanama was drawn up and his signature was taken tegarding the three notes given to him.Parsharam went to the house pointed out and found accused No.1 and several others gambling there,He joined them and gambled on two figures "1" and 10 and paid one rupee on the former and two rupees on the

latter. A chit with the said numbers and the amounts was handed over to him by accused No.1 Within five or ten minutes thereafter the Police Sub-Inspector raided the house with Panchas. He found all the opponents present there and when a search was made he found different sums of money with them and also various chits with marked numbers and amounts. The three marked notes which had been given to Parsharam were found with the accused No.1 and the chit containing the figures "1" and "10" and the amounts of one rupee and two rupees on them was found with Parsharam. A panchanama was drawn up and all the eight opponents and one Nijaya Shiddayya were sent for trial. At the trial Nijaya was made an approver and was examined as a witness for the prosecution under section 10 of the Act.

All the accused denied having gambled in that house and accused No.1 stated that he was not in occupation of that house and had never taken it on rent. He also said that the papers were not in his possession and that the amount attached was from his grocery shop. He denied having given any chit to Parsharam.

The learned Magistrate apparently did not believe t this defence and believed the Panch and the Police Sub-Inspector and found that the articles mentioned in the Panchanama were found in the house raided. But he observed that accused No.1 havin denied that he was in possession or occupation of the house, it wa was the duty of the prosecution to prove that he was the occupant of the house and that in he absence of any proof to that effect, the house could not be said to be a common gaming house. He further observed that accused No.1 though he is alleged to have given the chit to the punter Parsharam, was not proved to have written the chit and no evidence was adduced to prove that the

chit was in his handwriting ,and thinking that it was unsafe to rely solely on the punter and the approver he thought that the ownership of the house itself not having been proved ,all the accused were entitled to the benefit of doubt.

The whole of this reasoning ignores the provisions of sections 6and 7 of the Act.It is not disputed that the special warrant which the Sub-Inspector obtained from the Sub Divisional Magistrate was under secion 6 and there was no defect in the warrant., e raided the house where all the accused were found on the strength of that warrant and at the time of the raid several chits containing the figures of cotton futures and the amounts of the bets as weel as the marked currency notes given given to the Punter Parsharam were found.All these were instrumentsof gaming and under section 7 the learned Magistrate should have raised a presumption that the house was a common gaming house and shifted the burden of proof of innoence to the defence.But the accused have made no attempt to explain how the chits came to be found with them and how the marked currency notes happened to be with accused No.1 .As the accused failed to explain the possession of the instruments of gaming,the prosecution stands unrebutted and therefore all those who were found in the house must be presumed under section 5 to have been present there for the purpose of gaing.Moreover there was direct evidence in this case to prove that accused No.1 was recebing the bets.the marked currency notes tendered by Parsharam were found in his possession and Parsharam's evidence is borne out out by that of the approver.Had they stood by themselves,they would not have been sufficient to justify the conviction of the

the accused .But their statments are borne out by the fact that instruments of gaming were found in the room and the marked currency notes were found with accused No.1.It is true that the prosecution has led no evidence to prove that the house belonged to accused No.1 or had been taken on rent by him.But under the amended section 4 of the Act whoever opens,keeps or uses any house,room or place for the purpose of a common gaming house is puhishable under that section.It is not nycessary that such person must be either the occupier the owner of the tenant of the house. here is no doubt that accused No.1 was using the house,whoever may be its owner or occupier,for the purpose of a common gaming house and was receiving bets from gamblers.Hence he must be held to be the person keeping the common gaming house.

Out of the opponents,apponents Nos. 4 and 5 could not be served with the notices and their names have been struck off on the request of the learned overnment Pleader.

We set aside the acquittal of the other accused, accused Nos. 1,2,3,6,7 and 8 and convict accused No.1 under section 4 and 5 of the Bombay Prevention of Gambling Act and sentence him to a fine of Rs.50 under section 4 and Rs.25 under section 5 or in default regorous imprisonment for two weeks under each section and we convict the other accused,accused Nos.2,3,6, 7 and 8 under section 5 and sentence them each to pay a fine of Rs.25 or in default to suffer rigorous imprisonment for two weeks

Ordinarily in cases like this the accused are to be sentenced to imprisonment and under section 4 the minimum sentence prescribed for the first offence is rigorous imprisonmen for one month or a fine of not less than Rs.500 or both,but

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but his is a stale case, the offence having taken place as far back as in April 1945. It has been pending in this Court as Government could not supply the Court with a print of the case for all these months and in view of this delay we think that it is not proper to send the accused to imprisonment.

Criminal Appeal No. 457 of 1946 with Cr. Appeals Nos. 458 of 1946, Cr. Appeal No. 503 of 1946 (By Govt.) and Cr. Review No. 592 of 1946.

Appeal No. 457 of 1946: Mr. B. M. Kalagate for accused No. 3.
Appeal No. 458 of 1946: Mr. B. M. Kalagate for accused No. 1.
Appeal No. 503 of 1946: Mr. B. M. Kalagate for accused No. 2 (appointed)
Review No. 592 of 1946: Mr. B. M. Kalagate for the accused.

The Government Pleader for the Crown.

Coram:- Sena and Gajendragadkar, JJ.

11th March 1947.

Oral Judgment (Per Gajendragadkar, J.):-

These four appeals arise from the decision of the learned Additional Sessions Judge at Belgaum, in Criminal Case No. 37 of 1946 in which the three accused persons were charged with having committed an offence punishable under s. 302 read with s. 34 of the Indian Penal Code. The case against them was that on or about the 1st of December 1945 at about 11-30 a. m. at Bail Hongal these three accused with the common intention of committing the murder of Gangaya did commit his murder by intentionally causing his death. This charge was tried by the learned Additional Sessions Judge with the help of assessors. All the assessors were of the opinion that the offence charged against all the accused had been proved. The learned Judge, however, took the view that the offence had been proved against accused Nos. 1 and 3, but not against accused No. 2. On that view he convicted accused Nos. 1 and 3 of the offence charged and sentenced them to transportation for life. Accused No. 2 was acquitted. Accused Nos. 1 and 3 have preferred appeals Nos. 457 and 458 of 1946 against the order of conviction and sentence, whereas Government have preferred appeal No. 503 of 1946 against the acquittal of accused No. 2. In their review application No. 592 of 1946 Government have applied for the enhancement of the sentence passed against accused Nos.

1 and 3.

The material facts leading to the present case can be briefly stated thus. The deceased Gangaya who was originally a resident of the village Korvikopp was very much harassed by accused Nos. 1 to 3 who were residents of the same village. As a result of the said harassment Gangaya left the village Korvikopp and settled down at Bail Hongal about 3 or 4 years before the date of this offence. There was enmity between the deceased Gangaya and the members of the family of the three accused over several matters and this enmity had led to several criminal complaints between the parties. It would appear that the family of accused No. 2 had been cultivating the land of one Shivnaik for many years and the said family had been deprived of the possession of the said land by Shivnaik. It is alleged that members of the family of accused No. 2 felt that this was the result of the advice given by Gangaya to Shivnaik since Gangaya was looking after the affairs of Shivnaik. The brothers of accused No. 2 and certain other persons had on another occasion opened the grain pit of Gangaya in Korvikopp and had removed the grain stored therein. This incident had led to a complaint by Gangaya which had terminated in the conviction of the accused including the brothers of accused No. 2. This was followed by a similar incident with regard to certain kadaba stack belonging to Gangaya which had been burnt by the brother of accused No. 2 and his friends. In this case again the accused were convicted. The brother of accused No. 2 thereafter removed the crop growing tin the fields of Gangya. In addition to these private disputes, there was a dispute among the Hindus and Muslims of Korvikopp over the use of certain ground which was claimed as the burial ground by the Muslims of the village. The Collector had issued an order prohibiting the use of the said place as a burial ground, and the Muslims of the village including the members of accused Nos. 2 and 3's family thought that the order of the Collector was passed at the instance of Gangaya. The prosecution

alleged that accused No. 1 was a close friend of accused Nos. 2 and 3 and that in all disputes between them and the deceased accused No. 1 sided with accused Nos. 2 and 3. According to the prosecution the incident of the 1st of December 1945 which has given rise to the present criminal proceedings was the result of this long standing enmity between the deceased and accused Nos. 2 and 3.

On the date in question at about 11 or 11-30 a.m. Gangaya was proceeding in a street in the bazaar of Bail Hongal when he was suddenly attacked by all the three accused and done to death. The prosecution case is that accused No. 1 attacked him with a battle-axe, while accused Nos. 2 and 3 gave him blows with sickles. As a result of this attack several injuries were inflicted on Gangaya, some of which were on vital parts. Gangaya immediately fell down on the street and shortly thereafter he expired. After committing the attack on Gangaya the three accused, according to the prosecution, mamaged to run away. This incident was seen partly by Baswanni Pattihal and some other witnesses. Baswanni approached the deceased as he was lying on the ground and was told by him that accused No. 1 and some others had inflicted the injuries on him. Thereafter Baswanni proceeded to the Police Station and filed hi first information report in which he stated what he had been told by the deceased, and he also alleged that it was reported by persons present that the offence had been committed by the residents of the village of Korvikopp.

This first information which was filed by Baswanni led to the further investigation as a result of which the charge was levelled against the accused as I have already set out. Since the investigating officer heard about the name of accused No. 1 as the assailant of the deceased, and since the enmity between accused Nos. 2 and 3 and the ~~accused~~ deceased was well known, it would appear that a junior Sub-Inspector was deputed to Korvikopp to arrest accused No. 1 and his friends. The house of accused No. 1 was

searched and the houses of accused Nos. 2 and 3 were found to be locked. None of the accused returned to their houses and though a search was made at their houses they were not found until they were arrested on the 2nd of January 1946 in the Hosur jungle. After the accused were arrested, two parades were held by the investigating officer on the 16th and 17 of January respectively. At these parades some of the witnesses identified some of the accused persons. Eventually the charge-sheet was forwarded to the Committing Court on the 23rd January 1946.

All the accused persons denied the charge levelled against them. Accused No. 2 admitted that there was ill-will between him and Gangaya and the relations of Gangaya. Accused Nos 1 and 3 did not admit the prosecution case about the enmity, and all the accused set up some sort of an alibi, pleading that they were not at Bail Hongal when the offence was committed. They likewise denied the prosecution case that they were absconding. They suggested that they were in their village and had no occasion to abscond.

In support of their case the prosecution have examined four witnesses to establish the existence of motive as against accused Nos. 2 and 3, and the friendship of accused No. 1 with accused Nos. 2 and 3. These witnesses are Gurunath, Kallappa, Maktumbi, the mistress with whom the deceased was staying, and Shivlingayya. The evidence of Maktumbi and Shivlingayya is of a general type, whereas the evidence of Gurunath and Kallappa gives details about the several incidents which had occurred between the respective parties as a result of the ill-will subsisting between them. The learned trial Judge found that the prosecution had proved by satisfactory evidence the existence of this longstanding feud between the deceased and the accused, and Mr. Kalagate for the accused has not seriously disputed that finding. Indeed, the evidence on this point is over whelming and the prosecution are entitled to ask the Court

to approach the case with this evidence of motive as the background.

As against accused No. 1 the evidence consists of the statements made by Baswanni and Fakirappa, as well as the declaration made by the deceased in the presence of Baswanni in which he (the deceased) implicated accused No. 1 as his assailant. There is further the fact that accused No. 1 was absconding until he was arrested in the H. sur forest. The witness Baswanni knew both the deceased and accused No. 1. He has stated that he had supplied fodder to the deceased on two prior occasions and that when he met the deceased on the morning of the day in question the deceased had asked him whether he was going to take fodder to his place. He also knew the accused because he was working in the hotel of Shingaya at Bail Hongal, and he says accused No. 1 used to visit the hotel and as such he knew him. On the morning of the Saturday in question this witness had gone to purchase some biscuits for the son of his sister. Having purchased the biscuits as he was proceeding to the spot where his sister was standing he saw accused No. 1 who had covered his body with a dhoti proceeding towards the direction where the witness had met the deceased just before. As he saw accused No. 1, according to this witness, accused No. 1 removed the dhoti and he could see that he had a battle axe in his hand. This witness swears that at this time accused No. 1 ran towards the place where the deceased was moving. Immediately thereafter he heard shouts from people that somebody had been cut, and as he looked back he saw the deceased lying on the ground gravely wounded. He proceeded to the spot where he was told by the deceased that accused No. 1 and some others had inflicted the wounds on him. Thereupon he proceeded to the Police Station where he filed the first information. It has been brought out in the cross-examination of this witness that he had been convicted for the offence of theft a year and a half ago. It has also been brought out that he did not

talk to Fakirappa, another witness who was present on the scene, and he has made some discrepant statements as to when the people came near the spot where the deceased was lying. But, on the other hand, there is this important fact that almost immediately after the incident he made a first report to the Police Station in which he set out the dying statement of the deceased and also the report which he had heard from the persons standing on the spot that the strangers from Korvikopp village had committed the offence. He knew both the deceased and accused No. 1, and it has not been suggested in his cross-examination that he was either interested in the deceased or was actuated by feelings of enmity against accused No. 1. The learned Judge and the assessors were impressed with the evidence of this witness, the learned Judge having made a special note about his demeanour. We think that his evidence cannot be disregarded and we are not satisfied that we would be justified in taking a different view as to the character of this evidence. If this evidence is accepted, and we think it must be accepted-it would prove the presence of accused No. 1 near about the scene of offence. It would also show that accused No. 1 ran towards the deceased with a battle-axe in hand. As I have already said it also shows that the deceased mentioned accused No. 1 as his assailant. No satisfactory explanation has been given by accused No. 1 as to why he was present at Bail-Hongal at that time. In regard to the dying statement of the deceased it is some what remarkable that though there was longstanding feud between him and accused Nos. 2 and 3, he did not mention their names and mentioned the name of accused No. 1. That, we think, shows that the deceased made an honest statement, since we are satisfied that after the deceased received the strokes from accused No. 1 he must have fallen to the ground and could not have seen who the other assailants were.

The next witness on whose evidence the prosecution rely in their charge against accused No. 1 is Fakirappa. He was originally a resident of Korvikopp, but has gone to Bail Hongal where he has been residing for some time past. This witness had gone to Bongale's shop to purchase articles of grocery. He knew all the accused. He saw the attack made by accused Nos. 1, 2 and 3 on the deceased Gangaya. In his evidence before the Sessions Court he had stated that he saw accused No. 1 giving one cut with an axe. Thereafter says the witness, accused No. 1 cried out "Where are you? Come." So saying accused No. 1 gave another blow to the deceased. As the deceased was falling down accused Nos. 2 and 3 came there from the side of the shop of Irappa and dealt him blows with sickles which were in their hands. After the deceased was thus assaulted, one of the assailants ran towards the market. He was accused No. 3. Accused Nos. 1 and 2, however, called him back and asked him not to run in that direction. He also stated that after they ran away he saw Baswanni going towards the deceased and he also saw that the deceased talked to Baswanni. It has been brought out in the cross-examination that all these three statements were made by this witness for the first time in the Court of Sessions. Further, the defence have brought out in the cross-examination of this witness that there was a case against the brother of this witness filed by Basappa, the uncle of accused No. 1, and it has been suggested that the relations of this witness with the family and the party of accused Nos. 2 and 3 are such that he cannot be regarded as disinterested. In fact, the learned Judge himself took the view that this witness cannot be regarded as quite a disinterested witness and he held that though he would accept his evidence in the satisfactory explanation has been given by accused No. 1 as to why he was present at Bail-Hongal at that time. In regard to the dying statement of the deceased it is somewhat remarkable that though there

in the main, he would not treat that evidence as enough as against any of the three accused unless his evidence was corroborated by some other evidence. It, however, appears that there can be little doubt that this witness was present on the scene and must have seen the assault on the deceased. The mistress of the deceased, Maktumbi, has stated that when she had gone to the hospital Fakirappa told her about this incident. Having considered the evidence of this witness very carefully we think that this witness cannot be regarded as unreliable. It is true that having regard to the statements which he has made for the first time in the Court of Sessions his evidence will have to be considered with great caution and care in the light of the other evidence on the record. Incidentally it may be mentioned that the three details to which he has sworn in the Sessions court for the first time are shown not to have been mentioned by him to the police and there is some force in the contention of the learned Government Pleader that as the Investigating Officer interrogated this witness he may not have been interested in taking down all the details to which he deposed later. Omission on the part of the witness to mention certain details before the police the police may not always or necessarily amount to such a discrepancy in his story as to lead to the inference that the rest of his evidence must be discarded. Even so, as I have already stated, it will be necessary to examine the other evidence in the case while deciding the case of each one of the accused before us.

As regards accused No. 1 we have the evidence of Baswanni, the dying statement of the deceased, and the evidence of Fakirappa. The evidence of Baswanni appears to us to be quite satisfactory and we see no reason to differe from the conclusion of the learned Judge and the opinion of the assessors that the prosecution have proved their case against accused No. 1 on the strength

of this evidence. In addition to this evidence is the subsequent conduct of accused No. 1. It is quite true that such conduct cannot by itself help the prosecution case very much. But if in a criminal case the prosecution are able to prove that after the commission of the offence the accused absconded for more than a month and could not be arrested until his whereabouts were traced in a jungle, this conduct, in our opinion, is undoubtedly relevant and may have to be taken into consideration in deciding the case as a whole against the accused.

The evidence against accused No. 3 consists in the statements made by Fakirappa, Veerappa and Veerbhadrappa. I have already referred to the statements of Fakirappa.

Veerappa owns a shop in Bail-Hongal. He saw the deceased lying in front of Somappa Marbad's shop. This witness was at a distance of 81 feet from the place where Gangaya was assaulted and he did not know accused No. 3 before. He, however, swears that he saw accused No. 3 running away, and he says that he saw his face so well that he as able to identify him on the 16th and 17th January when the identification parades were held. It is not very clear on the record as to why the investigating officer did not hold the identification parades immediately after the accused were arrested, and the fact that the identification parades were in this case held more than a month and a half after the offence was committed does lend some support to the contention which has been urged before us by Mr. Kalagate that it may be that Veerappa identifies accused No. 3 by mistake. But unfortunately for the accused the case against him does not stand merely on the evidence of Veerappa. It receives considerable support from the evidence of a young boy, Virbhadrappa, who is aged

is aged 12. He is the son of a local lawyer and had gone to Vasudev tailor's shop to take from the tailor his sister's frock. He was told that the frock was not yet ready and he was naturally standing in the shop. He says that he saw accused No. 3 jumping over the bridge and running into the bol with a sickle in his hand. This fact that accused No. 3 jumped over a bridge was not mentioned by this witness before the police. In the Sessions Court this boy stated that he saw some one going to the deceased and talking to him and that at about that time 4 or 5 persons had collected. Both these statements were not made by him before the police. As regards the last statement the -- investigating officer mentioned that the witness had not indica--ted to him the number of persons who had collected. Mr. Kalagate for the accused has contended that these three details must be deemed to have been introduced by this witness as a result of tutoring, and he has argued that if it is discovered that the boy has introduced some details for the first time in the Sessions Court his evidence should not be accepted even as regards the other details which he has mentioned consistently from the beginning. The evidence of this boy appeared to the assessors and the learned Judge as very satisfactory and there can hardly be any question as to any motive which could have actuated this boy in falsely -- implicating accused No. 3. He has given his story in a natural manner and though some allowance must be made for the fact that he has introduced details we are not prepared to hold that these details he mentioned as a result of tutoring. In the case of child witnesses it is not unusual that facts which they have seen are mixed with the facts which they have heard, and it may be that having heard about Baswanni's talk with the deceased this witness may have made a reference to that incident in his evidence in the Sessions Court. The two other details which he has mentioned in

in the Sessions Court for the first time are not in any way sense material and it is not at all unlikely that he may have said that he saw accused No. 3 running towards the lane across the bridge without using the words jumped over it, and that he may have mentioned that persons had collected without giving their specific number. In any event these two details cannot, in our opinion, shake the value of the rest of the evidence which he has given against accused No. 3. This witness identified accused No. 3 at the parades which were held on the 16th and 17th January. It had been suggested by the accused that before the identification parades were held the witnesses were given an opportunity to see the accused; but that allegation has been denied by the panch and the police officer who arranged the identification parades, and we see no reason for accepting the suggestion of the accused in preference to the sworn testimony of the panch and the police officer. With regard to the identification by this witnesss again Mr. Kalagate's argument has been that there may be an element of mistake which must be taken into account before we decide to accept his evidence. With regard to this accused again his subsequent conduct in running away from his house after the incident and his prior enmity with the deceased are undoubtedly relevant facts on which the prosecution may rely. Having considered the whole of this evidence we are unable to hold that the learned trial Judge was wrong in taking the view that the case against him also had been proved.

The position with regard to accused No. 2 is that the learned trial Judge has acquitted him on the ground that the evidence against him is not satisfactory, and Government have

appealed against the order of acquittal in his favour.

The evidence on which reliance has been placed against accused No. 2 consists of the statements made by Fakirappa and Basappa. There is the further evidence of motive and subsequent conduct in absconding on which the learned Government Pleader has relied. I have already considered the evidence of Fakirappa. The evidence of Basappa must now be considered.

This witness is a servant in Somappa Murbad's shop. He knew the deceased Gangaya and he says that he had been cut about 11 or 11- 15 A.M. on a Saturday. He saw all the accused assaulting the deceased and he subsequently indentified them at the parades. He admitted that he had not seen any of them before the day of the offence and in examination in chief he had stated that he had not seen them at any time after the offence and before the identification parade. In cross-examination he stated that he had seen the faces of the accused to some extent an only and not fully, and that he had seen them on one occasion when they were being taken to the dispensary from the sub-jail for treatment before he was asked to identify them at the parades. When it appeared to the learned trial Judge that he had made somewhat discrepant statements as to whether he had seen the accused after the commission of the offence and before the identification parades, the learned Judge asked him some questions and in reply the witness stated that it was not true that he had not seen the accused after the offence and before the parade and that he had seen them for 10 or 15 minutes when they were being taken to the hospital. In view of these statements the learned Judge was inclined to take the view that the witness had been tampered and was not in a mood to adhere to the statements

which he had made at the previous stages including the statements made by him in the examination in chief. The question which arises for decision, therefore, is whether in view of the evidence of Fakirappa and Basappa, and in view of the overwhelming evidence as to motive as against this accused, as well as his subsequent conduct, the order of acquittal passed by the learned trial Judge should be --- sustained. It is quite true that in an appeal against acquittal the order of acquittal would not ordinarily be set aside unless the appellate Court feels fully satisfied that the evidence on the record leaves no room for doubt whatever as to the guilt of the accused. All the four assessors with whose aid the case was tried were of the opinion that the case against accused No. 2 had been proved. In fact, if the evidence of motive has any value in such cases it is of the strongest type against accused No. 2. There are certain infirmities in the evidence of Fakirappa and there is besides the circumstances in Basava's evidence that in cross-examination he made some statements inconsistent with the statements in the examination-in-chief. We have anxiously considered the statements of these two witnesses and the other circumstances in this case and we have come to the conclusion that the guilt of accused No. 2 as well is satisfactorily proved by this evidence. That being our view the appeal filed by the Government against this accused must be allowed and the order of acquittal passed by the learned trial Judge set aside. Accordingly we convict accused No. 2 of the offence punishable under s. 302 read with s. 34 of the Indian Penal Code.

That raises the question as to the sentence which should be passed against accused No. 2 and which has been

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passed against accused Nos. 1 and 3 by the learned trial Judge. The learnedGovernment Pleader has contended that the offence of which the accused are found to be guilty was very cruel. He has argued that there is no extenuating circumstance whatever which would justify the imposition of a lesser sentence. On the other hand, the charge against them is for an offence punishable under s. 302 read with s. 34, and though on the medical evidence there is no doubt that the injuries inflicted on the deceased were very severe and the intention of the accused who inflicted those injuries must have been to commit the offence of murder, in the absence of any direct evidence as to which of the injuries were caused by which of the accused and in view of the fact that the learned trial Judge has exercised is discretion in awarding the lesser sentence we do not think we would be justified in altering that sentence. Accused No. 1 who gave the blows with the axe is a young man of 21 years and has obviously acted as the hireling of the two other accused. After all the question of sentence must in the first instance be decided by the learned trial Judge in his discretion and in the circumstances of this case we are not prepared to hold that he has not exercised his discretion properly. It is only in cases where the discretion vesting in the learned trial Judge is found to have been improperly or injudiciously exercised that the interference of this Court in such cases could be said to be justified. That being our view we think the sentences passed by the learned trial Judge against accused Nos.1 and 3 should be confirmed, ad accused No. 2 also should be sentenced to transportation for life. The rule in the review application is discharged.